United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1231

To be argued by
GENE B. MECHANIC

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1231

B

P/S

UNITED STATES OF AMERICA, ex rel.
GEORGE FOYE,

Petitioner-Appellant,

-against-

L.E. LaVALLEE, Superintendent of
Clinton Correctional Facility,
Dannemora, New York,

Respondent-Appellee.

BRIEF FOR APPELLEE ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

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Question Presented

Does Petitioner's claim of an alleged error in the trial court's ruling on evidentiary matter raise a federal constitutional claim warranting federal habeas corpus relief.

Statement of Facts

This is an appeal from a memorandum decision and order of the United States District Court for the Northern District of New York, filed on January 4, 1974, denying and dismissing appellant's application for a writ of habeas corpus (Honorable James T. Foley). On January 22, 1974, Judge Foley granted appellant's application for a certificate of probable cause, and on February 11, 1974, granted appellant leave to proceed in forma pauperis.

Appellant was convicted of Class A felony for the murder of a child of the woman he was living with and by whom appellant had two other children (Supreme Court, Sullivan County, July 13, 1973). The infant was four years old at the time of death and was fathered by someone other than appellant. The child was admitted to the hospital and found to be suffering battered child syndrome that caused death and led to appellant's arrest and to the arrest of the mother, Delois Harden. Both were charged with murder. Appellant moved for and obtained a separate trial. Appellant appealed to the Appellate Division, Third Department, which affirmed without opinion, 41 A D 2d 902 (1973). Leave to appeal to the Court of Appeals was denied by Judge Breitel.

Although appellant's petition in the Northern District raised other issues, he seeks appeal only on his allegation that he was denied due process of law because the trial judge upheld the prosecution's refusal to permit defense counsel an examination of the complete report filed by the investigating state police officer containing notes of his conversations with appellant, Delois Harden and others. Defense counsel was given extracts from the report only to the extent, as the state trial judge ruled, that it covered the direct examination of the investigating officer.

Judge Foley denied the petition on the ground that "alleged errors in the admission of evidence at the trial formed no basis for a collateral attack in federal habeas corpus." He found no support for the contention that evidence favorable to the defense was improperly withheld in violation of a constitutional right or that the prosecutor intentionally concealed facts favorable to the defense. Furthermore, Judge Foley found the ruling of the state trial court to be in accord with New York law and took notice that the defense had express procedural provisions in that law to move for discovery before trial or to subpoena the report before cross-examination. Appellant did not, however, at any time, move for discovery nor serve a subpoena on any governmental agency or person for the production of any books, papers or records of any kind.

ARGUMENT

THE DISTRICT COURT'S DENIAL OF APPELLANT'S APPLICATION FOR A WRIT OF HABEAS CORPUS SHOULD BE AFFIRMED SINCE ALLEGED ERRORS AS TO STATE TRIAL COURT RULINGS ON EVIDENTIARY MATTERS FAIL TO RAISE ANY FEDERAL CONSTITUTIONAL CLAIM WARRANTING FEDERAL HABEAS CORPUS RELIEF.

In this habeas corpus proceeding, appellant is merely challenging a state trial judge's ruling on an evidentiary matter and, therefore, raises no constitutional claim warranting federal relief. United States ex rel. Phillips v. Jackson, 72 F. Supp. 18 (N.D.N.Y., 1947), affd. 162 F. 2d 414; United States ex rel. Corby v. Conboy, 337 F. Supp. 517 (S.D.N.Y., 1971); United States ex rel. Santiago v. Follette, 298 F. Supp. 973 (S.D.N.Y., 1969); Redd v. Decker, 447 F. 2d 1346 (6th Cir., 1971). "The Federal Court may not be used through the medium of a writ of habeas corpus to correct what a petitioner feels is an error of the state court. Habeas corpus may not be used as a substitute for an appeal or to determine the admissibility of evidence." United States ex rel. Phillips v. Jackson, supra, at 20.

Alleged trial errors in a state court do not constitute a violation of federal constitutional rights entitling a state prisoner to habeas corpus relief, although such rulings might

have been the basis for reversing a conviction had they occurred during the course of a trial in federal court. Pennington v. Stymchcombe, 428 F. 2d 875 (5th Cir., 1970); See also Bledsoe v. Nelson, 318 F. Supp. 114, affd. 432 F. 2d 923 (9th Cir., 1969); Redus v. Swenson, 339 F. Supp. 571, affd. 468 F. 2d 606 (8th Cir., 1972).

Appellant asserts that his counsel should have been allowed to inspect the complete report, filed with the state police, of a state police officer who had testified at trial, and not merely extracts from the report only to the extent, as the trial judge ruled, that it was relevant to the direct examination of the investigating officer. Assuming, arguendo, that, under New York law, the trial judge should have allowed appellant's counsel to inspect the complete report, this alleged error concerned only the inspection and possible admission of evidence and, thus, raises no claim cognizable in a habeas corpus proceeding. Habeas corpus will lie only to remedy a prejudicial nondisclosure. Scalf v. Bennett, 408 F. 2d 325, 330 (8th Cir., 1969). Thus, in United States ex rel. Saunders v. Myers, 276 F. 2d 790, 791-92 (3rd Cir. 1960) the Court said:

> "...Federal courts may not promulgate rules of evidence for state courts under the guise of preserving due process. The record before us does not reveal that [appellant] '... has been dealt with such a lack of fairness that we may say he has not been given due process of law.'..."

Similarly, appellant was not denied his right to due process of law, because not only was he given the grand jury minutes containing the testimony of the state police officer whose complete report he alleges he should have been able to examine, but the record indicates that appellant's counsel was able to examine the police officer extensively, and appellant fails to allege how counsel's inability to review the officer's entire report, instead of only the portion related to his testimony on direct-examination, has prejudiced the cross-examination of the officer. Thus, Brady v. Maryland, 373 U.S. 83 (1963) and United States ex rel. Butler v. Maroney, 319 F. 2d 622 (3rd Cir., 1963), both cited in appellant's brief, are inapposite to this case since, in both Brady and Butler, the prosecution had withheld information favorable and vital to the defendant, while here there has been no showing that the prosecution wilfully withheld favorable evidence to the defense or, in the alternative, that the "suppressed" evidence was vital and material to the defense. Clarke v. Burke, 449 F. 2d 853 (7th Cir., 1971), cert. den. 404 U.S. 1039.

Appellant cites Jencks v. United States, 353 U.S. 657 (1957) in support of his claim. Jencks is a federal ruling governing production of relevant statements and reports of government witnesses touching the subject matter of their testimony given at trial.

However, even if the Supreme Court's teaching in Jencks v. United States, 353 U.S. 657, applies to state court procedure, which appellee submits is not the case, appellant's request for possession of the complete police report was dealt with properly. In Jencks and subsequent federal court decisions concerning the production of reports made by a prosecution witness for defense inspection, it has been established that such production is required in a federal court trial to the extent that the report "relates to the subject matter as to which a witness has testified." United States v. Meisch, 370 F. 2d 768, 772 (3rd Cir., 1966). See also United States v. McCarthy, 301 F. 2d 796 (3rd Cir., 1962). The federal cases do not entitle the defense to examine the entire report to decide which portions relate to the witness' testimony on direct-examination, nor do they require the trial judge to review the entire report to determine such relevant portions. Hence, there is no support for appellant's contention (and indeed the above mentioned cases teach otherwise), that under federal law his rights were violated because the trial judge only required the prosecutor to produce for the defense those portions of the report which were relevant to the subject matter as to which the state police officer had testified.

In addition, the state trial judge's order was in accord with New York court decisions in narrowing production of reports by a prosecution witness to that material which is related to the witness' testimony on direct-examination. See People v. Rosario, 9 N Y 2d 286 (1961); People v. Malinsky, 15 N Y 2d 86. Accordingly, there was no possible basis for the District Court to find that the state trial judge committed error in limiting appellant's examination of the police officer's reports, because the state judge was following the practice established by New York's highest court.

CONCLUSION

THE DISTRICT COURT'S ORDER DENYING AND DISMISSING THE APPELLANT'S PETITION FOR A WRIT OF HABEAS CORPUS SHOULD BE AFFIRMED IN ALL RESPECTS.

Dated: New York, New York
April 26, 1974

Respectfully submitted,

LOUIS J. LEFKOWITZ
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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JEANETTE MARCELINA , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondent-Appellee herein. On the 26th day of April , 1974 , she served 2 copies of the annexed upon the following named person :

MICHAEL DAVIDOFF, ESQ.
Attorney for the Appellant
Ten Hamilton Avenue
P.O. Box 809
Monticello, New York 12701

Attorney in the within entitled appeal by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Jeanette Marcelina

Sworn to before me this
26th day of April , 1974

Assistant Attorney General
of the State of New York